



April 5, 2011

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The Honorable Bill Wielechowski, Chair
The Honorable Joe Paskvan, Vice-Chair
Senate State Affairs Committee
Alaska State Senate
Juneau, AK 99801

via email: Senator_Bill_Wielechowski@legis.state.ak.us
Senator_Joe_Paskvan@legis.state.ak.us

Re: House Bill 3 (CS House STA)
ACLU Review of Legal Issues

Chair Wielechowski, Vice-Chair Paskvan:

Thank you for the opportunity to submit written testimony regarding Committee Substitute (State Affairs) for House Bill 3 (CS-HB3), Relating to Issuance of Driver's Licenses.

The American Civil Liberties Union of Alaska represents thousands of members and activists throughout the State of Alaska who seek to preserve and expand individual freedoms and civil liberties guaranteed under the United States and Alaska Constitutions. From that perspective, we have several concerns with the proposed legislation, outlined in greater detail below.

Purpose of Driver's License: Federal Pre-Emption Issues

A driver's license' "primary purpose is to allow its bearer lawfully to drive a car." *U.S. v. Campos-Serrano*, 404 U.S. 293, 299 (1971). It is not intended as a document to relate to one's immigration status.

CS-HB 3 would require the State of Alaska both to determine *whether* someone is legally present in the country and to speculate on *how long* that individual may stay. This determination implicates the Supremacy Clause of the United States Constitution, which guarantees that federal law will supersede state law in the areas of immigration. “The Federal Government has broad constitutional powers in determining what aliens shall be admitted to the United States, the period they may remain, regulation of their conduct before naturalization, and the terms and conditions of their naturalization. Under the Constitution the states are granted no such powers; they can neither add to nor take from the conditions lawfully imposed by Congress upon admission, naturalization and residence of aliens in the United States or the several states. *State laws which impose discriminatory burdens upon the entrance or residence of aliens lawfully within the United States conflict with this constitutionally derived federal power to regulate immigration, and have accordingly been held invalid.*” *DeCanas v. Bica*, 424 U.S. 351, 358 n.6 (1976) (citations omitted) (emphasis added).

The once-a-year requirement to renew a driver’s license for those present for an indefinite period of time is similar to the annual registration requirement for legal immigrants overturned in *Hines v. Davidowitz*, 312 U.S. 52, 59-60 (1941). In *Hines*, legal aliens were required to obtain a Pennsylvania identification card, renewed every year, which had to be shown, among other purposes, “as a condition precedent to registering a motor vehicle in his name or obtaining a license to operate one.” *Id.* at 59. *The Pennsylvania identification requirement was invalidated, as Congress had reserved entirely to itself, or “occupied the field” of, the management of aliens within the borders of the United States.* *Id.*, (emphasis added). While the Committee Substitute allows for permissive mail renewal, **there is a still a differential burden imposed on lawful immigrants.**

Further, the United States Supreme Court has even held that some state laws relating exclusively to *undocumented immigrants* may violate the Supremacy Clause, **where the regulation does not clearly serve legitimate state interests.** *Plyler v. Doe*, 457 U.S. 202, 226-30 (1982) (overturning a Texas policy of not reimbursing public school districts for the costs associated with teaching undocumented students). Additionally, various federal statutes manifest an intent to prohibit discrimination against people on the basis of immigration status. *See, e.g.*, 8 U.S.C.A. § 1324b.

These cases and statutes indicate that, if enacted, CS-HB 3 would likely be found to violate the Supremacy Clause.

Legislation Directed at Immigrants: Suspect Classification

Generally, regulations explicitly directed at legal immigrants are considered suspect classifications, like distinctions based on race and nationality. *Graham v. Richardson*, 403 U.S. 365, 372 (1971). **The State of Alaska may not impose a special condition of driver’s license renewal on legal immigrants, for similar reasons as it could not impose such conditions on drivers of a certain race, sex, or religion.**

CS-HB 3, if enacted as drafted, would regulate the issuance of an essential document to legal immigrants, **in a manner discriminatory towards those legal immigrants and potentially burdensome**. Some immigrants may have short-term visas which are periodically renewed. The State of Alaska would impose unreasonable burdens on those immigrants by mandating that they also renew their driver's licenses each time they obtain a new visa, **for reasons having nothing to do with the fitness of the individual to drive a car**. See, *Lozano v. City of Hazleton*, 620 F.3d 170, 220 (3d Cir. 2010) (distinguishing between the city's authority to regulate the housing market for health and safety purposes, and the city's use of its regulatory powers to "regulate residence based solely on immigration status").

Equal Protection / Due Process Issues

CS-HB 3 additionally raises issues regarding violation of both federal and Alaska standards for equal protection. See, e.g., *State, Dep't of Revenue v. Andrade*, 23 P.3d 58, 78 (Alaska 2001) (noting that both sides conceded, and the court held, that an earlier regulation barring *all* legal aliens from obtaining money from the permanent fund violated equal protection). **That driving may be considered a privilege and not a right is immaterial; the denial to non-citizens of certain state benefits, including financial assistance for education and certain welfare benefits, has been ruled unconstitutional**. *Richardson*, 403 U.S. at 375-76; *Nyquist v. Mauclet*, 432 U.S. 1, 11-12 (1973).

Assuming that the statute's intended meaning is that some categories of non-citizens should be forced to renew their licenses more frequently than citizens, the use of immigration status, or alienage, as a classification violates equal protection.

Moreover, the Alaska Supreme Court has emphasized the status of driver's licenses as "an important property interest." *Champion v. Department of Public Safety*, 721 P.2d 131, 133 (Alaska 1986). A driver must receive meaningful due process before a "driver's license[] may be revoked or suspended." *Javed v. Department of Public Safety*, 921 P.2d 620, 622 (Alaska 1996) (citations omitted). While most due process cases relate to revocation or suspension of a driver's license, rather than issuance, given the technical legal nature of the terms by which the license is revoked, a court might look at this rule as requiring a substantial and meaningful hearing, including a court hearing, to determine the immigration status of the individual. Designating a license for early and automatic expiration is not functionally different from suspending or revoking the license.

Thus, allowing employees of the Division of Motor Vehicles to assess someone's immigration status would likely not comport with due process. Moreover, the implications of a due process challenge on this issue would merely heighten the pre-emption argument that the bill as a whole is invalid, as the statute would likely require state officials to assess independently a licensee's federal immigration status. That function is neither one that state officials are well-equipped to do, nor one that Congress has delegated to them.

Given the lack of expertise of state officials in the federal immigration arena, the “risk of error” in assessing whether someone is a legal immigrant and how long they may legally stay in the United States would seem to be high. Such “risk of error” would invalidate an automatic scheme of license revocation. *City of Redmond v. Moore*, 91 P.3d 875, 881 (Wash. 2004).

Additionally, the Committee may wish to consider the potential language proficiency issues of some legal immigrants and their lack of familiarity with the legal system. An immigrant who innocently misses a re-registration deadline, and is then found guilty of driving on an expired license, could have that conviction hamper their continued efforts to remain in the country or to become a citizen or permanent resident.

Procedural Issues: Departmental Regulations, Scope of “Indefinite”

A further problem with CS-HB 3 is that it dictates an outcome, without explaining a method. The bill leaves up to regulation by the department *how* the duration of the individual’s stay is determined. However, Alaska state administrative agencies have no identified expertise in determining immigration status, and the courts have noted the inability of the states to do so, as “the structure of the immigration statutes makes it impossible for the State to determine which aliens are entitled to residence, and which eventually will be deported.” *Plyler*, 457 U.S. at 236 (Blackmun J., concurring); *id.* at 226; *Lozano*, 620 F.3d 170, 197 (3d Cir. 2010).

Without a fixed system for determining the immigration status of driver’s license applicants, the uncertainty of the administrative determination could impose unreasonable suspicion on those who “look” or speak “differently.” “Guesswork unavoidably yields discrimination.” *Lozano*, 620 F.3d at 217. **A better course is for the state to leave determination of immigration status to the unified federal system, rather than enacting legislation and eventual regulations that put admittedly legal immigrants under a pall of suspicion.**

Conclusion

We hope that the Senate State Affairs Committee will note the multiple constitutional infirmities with the proposed language in CS-HB 3 (H STA).

The ACLU of Alaska does not contest the State’s ability and duty to regulate the safety of our roads. However, as drafted, CS-HB 3 goes far outside this permissible sphere. The issues raised above present substantial Constitutional problems and would entangle the state in lengthy, costly, and needless litigation, should HB 3 pass as currently written.

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Please feel free to contact the undersigned should you require any additional information. We are happy to reply to any questions that may arise either through written or verbal testimony, or to answer informally any questions which Members of the Committee may have.

Thank you again for the opportunity to share our concerns.

Sincerely,

A handwritten signature in black ink, appearing to read "J. A. Mittman", with a long horizontal flourish extending to the right.

Jeffrey Mittman
Executive Director
ACLU of Alaska

cc: Senator Albert Kookesh
Senator Kevin Meyer
Senator Catherine Giessel